IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 551 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DEEPKAKUMAR ALIAS BHALO SHANA BHAI SUTHAR

Versus

STATE OF GUJARAT

Appearance:

MR YATIN SONI for Petitioner

Ms. Katha Gajjar, APP, PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE A.L.DAVE

Date of decision: 28/09/2000

ORAL JUDGEMENT (Per: Kadri, J.)

1. Appellant has challenged legality and validity of judgment and order dated March 31, 1998, of learned Additional Sessions Judge, Panchmahals, at Godhra, in Sessions Case No.111 of 1996, by which judgment and order, appellant was convicted for offences punishable under Sections 363, 366, 376 of Indian Penal Code and sentenced to undergo imprisonment of R.I. three years and fine of Rs.1000/- in default simple imprisonment for three months for offence under Section 363 of Indian

Penal Code, R.I. for five years and fine of Rs.2000/- in default simple imprisonment for six months for offence under Section 366 of Indian Penal Code, and R.I. for 10 years and fine of Rs.10,00/- in default simple imprisonment for one year.

2. The prosecution case can be summarised as under:On December 16, 1994, the appellant had kidnapped minor daughter, Sumenben, from the lawful guardianship of her father, Ratnabhai Manabhai Parmar, with intention that she may be forced or seduced to have illicit intercourse. It is further case of the prosecution that the appellant had kidnapped minor girl, Sumanben, and taken her to various places, i.e. Surat, Godhra and Mahuda. The prosecution case further reveals that, while appellant and minor girl were staying at Surat, the appellant had sexual intercourse with her twice against her wish. It is further alleged that the appellant was constantly threatening the minor girl not to disclose that he had kidnapped her from the lawful guardianship of her father. The evidence of the prosecution witnesses further reveals that, when the appellant had no money with him, he had brought back minor girl, Sumanben, to Godhra. After return of minor girl, Sumanben, to her parents house, her father, Ratnabhai Manabhai Parmar, who was at the relevant time was serving in S.R.P. Group No.V, had lodged a complaint against the appellant for the offences punishable under Sections 363, 366, and 376 of Indian Penal Code on December 23, 1994 at Godhra Town Police Station, which was registered as C.R. no.I 317 of 1994. Investigation of the above crime was carried on by PSI. V.D. Dhavle. Prosecutrix, Sumanben, was sent for medical examination to Godhra Civil Hospital. The appellant was arrested from Dakor on February 8, 1995. The Investigating officer had collected clothes put on by the prosecutrix and the appellant and the same were sent to the Forensic Science Laboratory for analysis. Statements of witnesses were recorded by the Investigating Officer and after completing investigation, the Investigating Officer filed chargesheet against the appellant in the Court of learned Chief Judicial Magistrate, Godhra, for the the offences punishable under Sections 363, 366, and 376 of Indian Penal Code, which came to be numbered as Criminal Case No.5888 of 1995. As the offence under Sections 366 and 376 of Indian Penal Code were exclusively triable by the Court of Sessions, learned Magistrate committed case for trial to the Sessions Court Panchmahals at Godhra, which came to be numbered as Sessions Case No.111 of 1996.

3. Charge Exh.2 was framed against the appellant for offence punishable under Sections 363, 366, and 376 of

Indian Penal Code. Charge was read over and explained to the appellant. The appellant pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution led oral as well documentary evidence against the appellants to substantiate the charge.

4. The prosecution in order to bring home guilt of appellants, examined (I) P.W.1, prosecutrix, Sumanben Ratnabhai, Exh.5, (II) P.W.2, complainant, Ratnabhai Manabhai, Exh.6, (III), P.W.3, Kanubhai Budhabhai, Exh.17, (IV) P.W.4, Tukaram Ramchandra, Exh.18, (V), P.W.5, Rajubhai Venkatrao, Exh.19, (VI) P.W.6. Bhalabhai Hirabhai, Exh.20, (VII) P.W.7, Ishwarbhai Somabhai, Exh.21, (VIII), P.W.8, Rameshbhai Mithabhai, (IX), P.W.9, Limbabhai Devabhai, Exh.28, (X) P.W.10, Fatesinh Bagjibhai, Exh.29, (XI) P.W.11, Vijaykumar Tuljabhai Navle, Exh.30, (XII), P.W.12, Dariavsing Bhavansinh, Exh.32, and (XIII) P.W.13, Rustambhai Amirbhai, Exh.34. The prosecution also produced documentary evidence such as complaint at Exh.7, medical certificate of Sumanben at Exh.22, birth certificate issued with regard to age of proscutrix, Exh.26, report of FSL at Exh38, etc. to prove the case against the appellant.

5. After recording of evidence of prosecution witnesses was over, further statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure, 1973. The case of appellant in his further statement was of total denial.

6. Learned Additional Sessions Judge, after hearing arguments of learned Additional Public Prosecutor, and learned counsel for the defence, concluded that the prosecution had proved that the appellant had kidnapped minor girl, Sumanben, from the lawful guardianship of her father with intention to force her to marry against her will and had actually committed intercourse with her when she was a girl of age of 16 years. On the abovereferred to conclusion recorded by learned Additional Sessions Judge, the appellant came to be convicted and sentenced as stated in paragraph 1 of this judgment, which has given rise to filing of this appeal by all the appellant.

7. Mr. Yatin Soni, learned counsel for appellant and learned Additional Public Prosecutor, Ms. Katha Gajjar, have taken us through entire record and proceedings of Sessions Case No.111 of 1996.

8. Learned counsel for the appellant has only addressed to us with regard to quantum of sentence imposed on the appellant. The learned counsel for the appellant has not challenged order of conviction recorded by learned Additional Sessions Judge. Learned counsel for the appellant has submitted that, at time of commission of offence, the age of the appellant was only 17 years and the prosecutrix had wilfully joined the

appellant in moving to various places. Learned counsel for the appellant further submitted that looking to the age of the appellant and the prosecutrix, a lenient view requires to be taken. In support of his submission, learned counsel for the appellant has placed reliance on the Division Bench of this Court in the case of Budhiyo Chhaganbhai Vaghri vs. State of Gujarat, reported in 1991 (2) GLR 1243. The Division Bench, in the abovereferred to case, had, in the facts and circumstances of that case, had observed that the appellant before the Division Bench had committed offence in his youthful exuberance and his case cannot be put on par with others where the accused may be called sex-maniacs who are out to satisfy their lust or sexual hunger any how. The Division Bench, taking lenient view of offence and bearing in mind the conduct of the accused, had reduced sentence from seven years to two years. Learned counsel for the appellant has further placed reliance on the decision of the Division Bench of this Court in the case of Dharmendra Dhirajlal Soneji vs. State of Gujarat reported in 1996 (2) G.L.H .727. In the above case, the prosecutrix was 13 years and looking to her age the Sessions Court had imposed sentence of seven years on the appellant which was challenged by the appellant before the High Court. The High Court took a lenient view of the matter in view of the fact that, according to the affidavit of Anupama who was the wife of accused, if Dharmendra was made to suffer the entire period of RI of 7 years, that will consequently adversely recoil upon the happy marital life prospects of his wife and the only child which will shatter and ruin their lives. The High Court, on relying on the decisions of the Supreme Court in (1) AIR 1980 Supreme Court 249 (Tulsing v. State of Haryana: (2) AIR 1989 Supreme Court 937 (Premchand v. State of Haryana; (3) AIR 1994 Supreme Court 222 (Raju v. State of Karnataka, had reduced sentence from seven years to two years bearing in mind the peculiar facts and circumstances of that case. Learned counsel for the appellant relied upon the judgment of the Supreme Court in the case of Phul Singh vs. State of Haryana, reported in 1980 CRI. L.J. 8, wherein the Supreme Court, taking into consideration the age of the accused and he being not habitual offender, had reduced sentence of R.I. for four years to R.I. for two years. The Supreme Court, while taking lenient view, had observed as under:

"Ordinarily, rape is violation, with violence, of the private person of a woman - an outrage by all canons. In our conditions of escalating sex brutality a four-year term for rape is not excessive. However, in the instant case the accused was in his early twenties and he was not

a habitual offender and signs of repentance were seen. The families of accused and victim being closely related, were also ready to take a lenient view of the situation. In the circumstances, the sentence was reduced from 4 years to 2 years' R.I."

Learned counsel for the appellant also invited our attention to the judgment of this Court in the case of Himat Popatlal Raval vs. State of Gujarat, reported in 1983 (1) GLR p.268. The High Court, in the above case, observed as under:

"The circumstances of the case clearly show that both the accused as well as the prosecutrix are of immature age and the prosecutrix used to meet the accused often and on. She willingly participated in elopement from the house. Of course, the age of the prosecutrix being less than 16 years on the date of incident, her consent cannot be a defence for offences under sections 366 and 376 Indian Penal code, but this factor may certainly be taken into consideration while imposing sentence."

Relying upon the observations made by the Supreme Court as well as this Court in the abovequoted judgments, learned counsel for the appellant has submitted that, looking to the age of the appellant and the prosecutrix, lenient view deserves to be taken in the instant case also. It is further submitted that the prosecutrix had already got married and she is having a child.

9. The evidence of prosecutrix, Sumanben, indicates that she had eloped with the appellant on December 16, 1994 and had remained with him and had moved from place to place till February 8, 1995, i.e. for nearly three months. It is difficult to believe that the prosecutrix, during this period, was under constant fear and threat of the appellant. The conduct of the prosecutrix shows that she had gone with the appellant on her own volition and she had consented herself to the act. However, technically, as the age of the prosecutrix was below 16 years, even if there was a consent, an offence under Section 376 Indian Penal Code was made out. It requires to be stated that the father of the appellant and the father of the prosecutrix were serving together in SRP Group at Godhra and were staying nearby in SRP Quarters. Because of criminal prosecution pending against the appellant, he had left studies. Keeping in mind the above facts, particularly the age of the appellant and the fact that the prosecutrix had already settled in her life, in our opinion, sentence imposed by learned Additional Sessions Judge is little bit harsh. Therefore, we maintain conviction of the appellant for offences under Sections 363, 366, 376 of Indian Penal Code, but reduce the sentence to (i) R.I. for six months

and fine of Rs.500/- in default R.I. for one month for offence under Section 363 Indian Penal Code, (ii) R.I. for one year and fine of Rs.1000/- in default R.I. for three months for offence under Section 366 Indian Penal Code, (iii) R.I. for three years and fine of Rs.2000/in default R.I. for six months for offence under Section 376 Indian Penal Code. All the sentences are ordered to run concurrently.

10. As a result of foregoing discussion, the appeal is partly allowed. The sentence imposed on the appellant for the offences under Sections 363, 366 and 376 of Indian Penal Code are reduced in terms of the order in paragraph 9 hereinabove. Muddamal be disposed of as per directions contained in the impugned order.

September 28, 2000 (M.H. Kadri, J.)

(A.L. Dave, J.)
(swamy)